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INT-AR Paper 8 – Posting of workers in practice – Jan Cremers (UvT)

Introduction

This paper focusses on several aspects of the enforcement experiences of compliance offices and labour inspections in the area of workers, posted in the frame of the free provision of services:

- Experiences of labour inspections;
- Fraud practices and mechanisms in posting;
- Cooperation across institutions and social partners;
- Redress, effective enforcement and prevention of fraud.

The content is based on European and national research and cooperation projects, initiated by the labour inspectorate, social partners and compliance offices. In order to do justice to earlier research, the paper starts with a short retrospect of findings. The second section summarises the transnational experiences of labour inspectors in compliance activities. The third section provides an analysis of fraud practices and mechanism in the Netherlands, based on an assessment of the work of the Dutch labour inspectorate in the period 2014-2015. The last section reflects on the problems of redress and follow-up, once the inspection services have examined breaches and fraudulent practices.¹

Early research

In some sectors, the posting of workers in the frame of the provision of services goes back to a long tradition. Decisions to subcontract activities can be motivated by the search for expertise and know-how that does not belong to the own core activity; labour shortages and efficiency seeking; a traditionally evolved division of labour, with partners based on mutual trust, routine or historical reasons.

The posting rules in the EU are based on two legal instruments.

- Posting is defined as an exception to the EU coordination rules for social security. Normally the principle of *lex loci laboris* applies if EU-citizens use the right of free movement. In case of posting, the social security of the home country can stay upright (with a maximum of 24 months). The revision of the Regulations in 2004/2009 has not changed this exception.
- Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services (hereafter PWD) provides a frame for wages and working conditions for workers posted by their employer to deliver services in another Member State.²

Key aspects of posting (according to the Directive) are:

- The existence of a direct labour contract in the home country and the maintenance of the employment relation.*
- The posting company should be a genuine undertaking that normally carries out activities in the home country (and that temporarily performs services abroad based on a commercial contract).*
- The posting is temporary and the posted worker stays subordinated to the posting company while performing work related to the commercial contract between the posting company and the user undertaking.*

In one of the first assessments dedicated to the implementation of the Posting Directive in 2003, a team of the European Institute for Construction Labour Research (CLR) examined both the legal context and the practical functioning of the PWD in the framework of the free provision of services.³ The findings clustered around the key characteristics of posting (a direct labour contract in the home country, the posting company as a genuine service provider, the temporary character). The findings turned out to be representative for later experiences of the compliance and enforcement offices and the inspectorate. The verification of the genuine

¹ This paper was originally written in the frame of the project Posting of Workers - Protecting Mobility through Improving Labour Rights Enforcement in Europe (PROMO).

² Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJL 18 of 21 January 1997.

³ Cremers, J. and P. Donders, eds., 2004. The free movement of workers in the European Union. Directive 96/71/EC on the posting of workers within the framework of the provision of services: its implementation, practical application and operation, CLR Studies 4, Reed Business Information.

application of labour regulations turned out to be an arduous path. For instance, the fact that under the applicable rules for the coordination of social security, the decisive authority as to whether a person is employed or self-employed is the sending state, whereas under the PWD it is the receiving state, caused misunderstandings and a lack of clarity. Checking whether the undertaking in the home country was a genuine undertaking, pursuing economic operations on a stable basis turned out to be very difficult. Host countries had to rely entirely on information of the home country or the country of the registered office and the crucial cooperation and mutual exchange in this area were absent. As a result, the inspectorate had serious problems in controlling whether the posting was just a workforce supply or in fact service provision based on a commercial contract.

In 2003, Member States had hardly developed measures to ensure compliance with the posting rules. The liaison offices and the responsible national institutions suffered from a lack of staff and competences were too dispersed to guarantee effective control. The CLR-team recommended that national social and labour inspectors should step up their co-operation. They needed to be fully authorised to check and investigate respect for the labour conditions of the posted workers. Also a more effective execution of sanctions in cross-border situations should be ensured. Based on this research the European social partners in construction (FIEC and EFBWW) formulated a joint statement and pinpointed several fundamental problems. The partners noted that it is important to be able to verify, legally and in practice, if a worker is correctly posted and falls under the scope of the PWD. The social partners in construction referred to the desirability of providing 'transparent' and 'accessible' necessary information on the applicable labour conditions. They asked for liability in cases of fake self-employment and/or fake posting.

A team of CLR-experts reinvestigated in 2010, across 12 country cases, the functioning of the principles formulated by the PWD.⁴ The focus was on social and economic disparities between the formal legislative or conventional rights and the real wages and remuneration, working time, paid leave, living conditions and health and safety. The team worked with fact finding based on available national sources, control related data and statistics, prominent cases, best practices and the use of an indicative list of research items on compliance, and experiences with monitoring, enforcement and sanctioning. A key part of the national investigation used information from the liaison offices and compliance institutions (such as the inspectorate) responsible for monitoring the terms and conditions of employment. Compared to the 2003 study, the report identified greater divergence in transposition and application. As the Directive was concluded in the early 1990s, it was not foreseeable what the consequences of the 2004 enlargement would be, with a high proportion of these states not offering commitment to collective bargaining as a means of labour standards regulation. Also the intensification of agency work, subcontracting and outsourcing in numerous labour market segments had been stronger than foreseen. Both developments had a serious impact on how posting developed in practice.

The 2011-report distinguished four posting-related cross-border recruitment methods, with the use of the posting mechanism ranging from genuine long-established partnership between contracting partners to completely fake letterbox practices of labour-only recruitment.

1. *Normal posting* with specialised subcontractors providing temporary services in another EU Member State with well-paid skilled workers or qualified staff both belonging to the posting companies' core workforce.
2. *Legal posting* in the form of labour-only subcontracting where the calculation is made between engaging a domestic workforce and bringing in a workforce from abroad under the 'free provision of services' banner. A supplier providing workers from a country with low social security payments is cheaper than a domestic supplier; the legal character of the posting can be questioned if this is combined with long working hours and poor living and working conditions.
3. *Questionable practices of 'legal' posting* where the recruited workforce is confronted with deductions for administrative costs, lodging and transport, with tax deductions and obligatory refunding (after the return back home) of (minimum) wage payments. These practices are clearly in breach of the PWD.

⁴ Cremers, J., 2011. In search of cheap labour in Europe, working and living conditions of posted workers, CLR-Studies 6, International Books, Brussels/Utrecht.

4. Finally, different types of *'fake' posting* which varies from the distribution over a whole work gang of falsified A1 forms; recruitment via letterbox companies; unverifiable invoices for the provision of services; the recruitment of posted workers already present in the host country, workers turned into bogus self-employed.

The experiences of labour inspectors in compliance activities

The labour inspectorate of several European countries started to discuss and exchange experiences with posting in a series of projects, led by the French institute Institut National du Travail, de l'Emploi et de la Formation Professionnelle (INTEFP) in November 2010.⁵ The projects aimed to improve the transnational administrative cooperation of the relevant public authorities and the collaboration with the social partners.⁶ The INTEFP-projects, based on exchanges between the inspectorate, the social partner organisations, liaison offices and other relevant national actors, led to new insights and confirmed the practical problems that were identified in earlier research. At a later stage, the projects had two main objectives:

- Reinforcement of the transnational cooperation of the relevant controlling agents and liaison offices in order to improve the impact of actions carried out by public authorities;
- Continuation of the development of synergies between public authorities (labour inspection, social protection and fiscal authorities) and social partners.⁷

The inspectorate underlined the necessity of enhanced cooperation between all stakeholders (public and competent bodies, social partners): before the cross-border provision of services starts with posted workers and in the period of the workers' stay in the host country (and, in case of breaches, even after the service provision has ended). The projects led to the formulation of fields of action that fit in activities with shared partnership and cooperation models. Several pilots served as a training practice for the inspectorate. In the last project period, the focus was on the detections of cases, the organisation of joint pilots of control and monitoring actions, completed with site visits. The notion that fraudulent use of posting is often shaped as a circumvention of the national regulatory frame of pay, social security, and labour standards in the host state has been confirmed in the findings of the projects.⁸

The inspectors signalled several forms of circumvention:

- Cross-border recruitment via (temporary) agencies.
- Sham self-employment in cases where differences between a commercial contract (for the provision of services) and a labour contract are blurred.
- Fake posting because control is inadequate or easily bypassed.
- Shift to other industries (regime shopping).
- Manipulation with the free establishment (fictitious companies and arrangements) and country of residence.
- Abuse of entitlements that are guaranteed by the posting rules (working time, minimum wage, pay scaling not in line with skill level, absurd deductions).

The project results show that control of the regularity of posting and the collection of evidence and supporting documents are hindered by poor registration and the lack of the necessary competence in the host country. Participants in the project often had to conclude that, once irregularities were detected, an accumulation of breaches and circumvention was the rule rather than the exception. This raises the question where the competence lies for the overall compliance control of the regular character of the cross-border provision of services with posted workers. The INTEFP-projects confirmed the problems with compliance, the lack of cooperation, notably in this area, the difficulties to trace circumvention in cross-border situations and the weakness of the existing sanctioning mechanism. One key joint frustration for the competent institutions, and in fact for all stakeholders, is the difficulty to bring cases of breaches to a righteous end.

⁵ INTEFP's mission is enshrined in the French law (decree 2005-1555, December 2005). Main task is the training of the labour inspectorate. INTEFP also has the task to initiate national and international partnerships that are relevant for the work of the inspectorate.

⁶ See: http://www.eurodetachment-travail.eu/datas/files/EUR/synthese generale_2013EN.pdf

⁷ http://www.eurodetachment-travail.eu/datas/files/EUR/EURODETACHEMENT_project_2014_EN.pdf

⁸ Cremers, J. (2013) Posting of workers: enforcement problems and challenges, in *Posting of workers: Improving collaboration between social partners and public authorities in Europe - General synthesis*, INTEFP.

An analysis of fraud practices and mechanism in the Netherlands

In an assessment of the work of the Dutch labour inspectorate, one section is dedicated to posting mechanisms that can be signalled in cases with at least an assumption of fraud. The assessment focused on the results of a campaign that started in the Netherlands after the 2013 social pact. In this pact, social partners and the government decided to enhance their cooperation in the fight against letterbox companies and in the control and enforcement of collective agreements and mandatory working conditions. After analysing 27 files in a sample of 45 dossiers (in construction, shipbuilding, food processing, transport and scaffolding), five mechanisms were found that are partly intertwined: contracting/pay-rolling based on invoices, chains of subcontracting, the use of artificial foreign legal entities (letterboxes), cross-border provisions of labour-only through posting and finally regime-shopping with A1 forms.⁹

The inspectorate files provide evidence that posting is often used as a labour cost saving method, with savings on direct wage costs resulting from partial or non-compliance with collectively agreed wage and working conditions, underpayment, too low wage scaling (with, as a consequence, a mismatch of qualification and pay level), non-compliance with agreed wage harmonisation between industries (for instance, the equal pay principle for agency workers), too long working hours, the non-payment of overtime and other pay-related bonuses and from unreasonable deductions. In most cases the worker is not informed, is afraid to ask for redress or accepts the low pay, because of the imbalance in power and position on the labour market. It can also contribute to a lowering of indirect employers' costs. These costs cover a range of wage-related financial obligations, varying from undeclared pay of part of the wage components and allowances, the search for cheaper conventional frames (non-binding agreements) and regime-shopping (with collective agreements that have a softer regime of employers' contributions), circumvention of (mandatory) employer contributions to industry-wide provisions and funds (vocational training, OSH and other social policy and protection funds), the flagging-out or the conversion of agency work into the provision of services (no 'wage related costs', only 'invoices'). Savings on social security consists of the hiring of workers from low contribution countries for the employment in countries with high social security contributions. A1-forms, which state that the workers is secured in the country of registration, suggest that everything is perfectly legal. However, the use of an A1-form and an appeal to posting (even if it is just suggested) can hamper research and the control of regularity. It requires verification in the country of registration, which is time-consuming, and it requires the establishment of a working relation with foreign competent authorities. Pay related tax savings methods appeared in different ways, often as a result or combined with other saving methods. Low wages lead to lower payroll tax, undeclared or untaxed allowances and other net payments diminish the total tax costs. Fiscal engineering and lack of clarity about where the turnover has been realised offer methods to lower the corporate tax. Which regime applies and what has to be paid gets completely out of sight in situations with several subcontractors in a triangled cross-border context (with a country of origin, a host country and another country for the financial transfers). The use of artificial establishments for the financial office in a country with no output and turnover leads to lower tax payments. The next citation provides a good overview of the findings.

The analysed files confirm the findings in some of the earlier research: a lack of information about the size and the composition of the workforce, no transparency about the necessary underlying commercial contracts, no clear indications about the temporary character of the work, breaches of the hard core of working conditions, unverifiable deductions, long working hours and no overtime pay, and serious question marks with regard to the payment of social security contributions. The involved Dutch firms and contractors work with foreign agencies and recruitment establishments, often owed by Dutch executives. These recruiters enter the market under the pretext of the cross-border provision of services, although de facto the only core business of the supplier is labour recruitment. Posting serves to meet labour shortages and to find workers for repetitive, low-paid and dirty work. It helps to keep the wages in some labour intensive sectors low. In legitimate cases of posting, the user firm has already the advantage of a supplier that calculates with low security costs and only the minimum of pay and working conditions. In the investigated dubious cases, the breaches of unpaid overtime, unjustifiable deductions for lodging and travel and other non-compliance with the hard core of working conditions, makes the gap with the ordinary pay according to Dutch levels much wider. In these cases,

⁹ Cremers, J. (2017) *Drie jaar ervaring met intensievere cao-naleving* (The enhanced inspection of collectively agreed working conditions - An assessment of the compliance files, based on the Social Pact 2013), Tilburg Law School. An English executive summary is available at: https://pure.uvt.nl/portal/files/18770967/Enhanced_inspection_report.pdf

this is also covered up with two pay slips, one for the Dutch authorities and one for the home country, with no clarification of the real pay. In the dishonest cases, the formal reference to free service provision with posted workers is a façade for non-compliance. The incubators of this method know very well that control is impeded, that the reference to posting leads to time-consuming research (verification of registration, contracts and pay slips, checking of the genuine character of A1-forms and of the legality of firms and agencies), also because consultation of colleagues abroad is needed, and that competences to tackle breaches effectively are missing. In short, invoking posting provides a fine alibi to hamper or even to end investigations.¹⁰

Redress, effective enforcement and prevention of fraud

The use of posting in labour-intensive segments of the labour market does not necessarily lead to a deterioration of working conditions. The problem arises as soon as cross-border labour-only subcontracting is presented as a provision of services. In such a situation, the freedom to provide services with posted workers creates an opening for forms of recruitment, not intended by the legislators. This is especially the case when companies externalise the recruitment of labour to small subcontractors, leading to the use of agencies, gang masters and other intermediaries that act as the go-between for the worker and the user undertaking or the specialised subcontractor. Distortion of the labour market is potentially substantial and posting can become one of the channels for the cross-border provision of cheap labour in the single market without the application of the equal treatment that can be derived from the EU legislation related to the free movement of workers.

It can be concluded that monitoring of posting rules is difficult and that enforcement lacks strong sanctioning. Problematic for all stakeholders in a compliance campaign is the lack of effective sanctions. Fines are weak in an extra-territorial context and most countries have no specific posting-related enforcement instruments. The fact that the tackling of artificial arrangements and of fraudulent cross-border labour recruitment very often comes too late or that these practices can pop up repeatedly, leads to serious frustrations. Competence to deregister establishments lies outside the competences of the inspectorate and social fraud is still not seen as a major offense that could argument a European-wide sanctioning. However, a more horizontal transnational cooperation right across all relevant policy areas is of the utmost importance. Inspectors often trace firms that are active in several countries, using the same methods, whilst their presence in the country of registration is only symbolic. This asks for cooperation, in the control and compliance activities, but also in the enactment and implementation of sanctions.

A key factor for the achievement of results is concerted action of compliance and enforcement authorities. It is necessary to develop comprehensive initiatives to enhance the effectiveness. Social partners (and related industry-wide institutions) can be seen as relevant stakeholders in this overall policy approach. This is even more the case in the search for a permanent change in the perception of fraud in terms of costs and benefits by the citizens and businesses. Special attention should be given to dubious subcontracting practices. Social partners report in several studies the appearance of artificial legal entities, like letterbox companies, that are opened for the purpose of subcontracting work to one or more countries. The workers most often work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of manpower. Such artificial arrangements should be properly sanctioned. Effective measures are needed in order to promote genuine operations and prevent abuses. Fake entities should be refused the entrance to the market (such as withdrawal of licenses and certificates or the exclusion from public procurement bids). Sanctions need to have an EU-wide effect in order to avoid non-genuine actors starting all over again in other constituencies. Competences to decide on and to control compliance with the regulatory framework of pay, working conditions, as enshrined in collective agreements and labour legislation, should be more allocated to the country of employment. This asks for a reestablishment of the *lex loci laboris* principle. Free movement of workers will only stay upright if this free movement takes place grounded on the principle of equal treatment in the territory where work is carried out. The competence to check the reliability of documents, which underpin the cross-border activity and, if necessary, to withdraw these documents in high risk sectors, must become an EU-competence that can be performed by competence authorities in both the sending and the receiving country.

¹⁰ Ibid. Cremers 2017, p.24.